85-526 (1)

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1984

NEWBY FRANKLIN LOVE and
SUE ROBINSON YOUNGBLOOD,
Petitioners,

-against-

UNITED STATES OF AMERICA,
Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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18 pp

Question Presented

Were the Petitioners Deprived of a Fair Trial and Due Process of Law as a Result of the Charge by the Trial Judge to the Jury?

List of the Parties

Apart from the parties named in the caption of this Petition, the other parties involved in the trial were Robert Edward Lee, Herman DeJesus Restrepo and Juan Carlos Ruiz.

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SUE ROBINSON YOUNGBLOOD,
Petitioners,

-against-

UNITED STATES OF AMERICA,
Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Newby Franklin Love and Sue Robinson Youngblood (hereinafter "the Petitioners") jointly pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fourth Circuit affirming the judgment of conviction entered against the Petitioners by the District Court of the United States for the District of South Carolina (Simons, Jr., J.) and denying Rehearing with Suggestion for Rehearing In Banc.

Opinions Below

The opinion and order of the Court of Appeals affirming the judgment of conviction appears in Appendix A, *United States v. Love,* 767 F.2d 1052 (4th Cir. 1985). The order of the Court of Appeals denying Rehearing with Suggestion for Rehearing In Banc appears in Appendix B.

JURISDICTION

The date of the order of the Court of Appeals denying Rehearing with Suggestion For Rehearing In Banc is July 29, 1985. This Court's jurisdiction is invoked under Title 28, United States Code §§ 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

Amendment V, United States Constitution:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces or in the Militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Federal Rules of Criminal Procedure, Rule 52(b):

> Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT OF THE CASE

The Petitioners stand convicted of violating the federal racketeering statute 18 U.S.C. §§ 1962(c)(d) (i.e., the "RICO statute") together with various federal drug laws, 21 U.S.C. §§ 841(a)(1), 846, 952(a), 960, 963. In addition, Love and Youngblood were convicted of violating the Travel Act, 18 U.S.C. § 1952(a)(3) and of transporting stolen aircraft in interstate commerce in violation of 18 U.S.C. § 2312. Love was also convicted of engaging in a continuing criminal enterprise ("CCE") in violation of 21 U.S.C. § 848.

Love was sentenced to 50 years imprisonment on the CCE count, which was to run consecutively to the 20-year term imposed on the RICO count. Love was also given a 5-year prison term for transporting stolen aircraft in interstate commerce to run concurrently with the other jail sentences imposed, for a total sentence of 70 years imprisonment.

Youngblood was sentenced to a term of imprisonment of 20 years on the RICO count which term was to run consecutively to 15 years imprisonment imposed under count two. Additionally, she received five years imprisonment on each of twelve other counts for a total sentence of 35 years imprisonment. Youngblood also received a special parole term of 3 years.

The Petitioners are presently serving their sentences.

A. The Government's Proof At Trial.

The superseding indictment, upon which the Petitioners were tried, named some 14 individuals and alleged 19 counts.[1] The indictment was not only lengthy but exceedingly convoluted. Indeed, the trial judge advised the jury that his charge would be much longer than any he had ever given in his 19 years on the bench (R. 15-2).[2]

The Government's case consisted of proof relating to three separate areas: (1) Love and Youngblood's relationship with drug dealers during 1980 and 1981 and the marijuana and cocaine deals of that period; (2) the cocaine trafficking by Love and Youngblood in 1982 and Love's involvement in armed robberies of competing

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[1] Although the superseding indictment named some 14 people, only the cases of the Petitioners and the defendants, Robert Edward Lee, Herman DeJesus Restrepo, and Juan Carlos Ruiz, went to verdict. The jury acquitted Restrepo and Ruiz of all counts. Lee was convicted and sentenced to a total term of imprisonment of 25 years.

[2] The letter "R" refers to the trial transcript.

drug dealers and others deemed unlikely to report these incidents to the authorities; and (3) Love, Youngblood and Lee's unsuccessful attempts to import marijuana and cocaine by airplanes from Colombia to South Carolina.

To establish its case, the prosecution elicited the testimony of more than 80 witnesses, entered into stipulations, and introduced tangible evidence, documents, and photographs as exhibits for the avowed purpose of corroborating its witnesses.

Wilbur Rutledge Corvette, Jr., hitherto convicted of numerous felonies, who in this case, had entered into a plea agreement with the Government, testified that he had first met Love in December, 1981, at a club in Columbia, South Carolina. At Christmas time, Love had given him a gift of $500 and thereafter, he saw Love continuously.

In his testimony, Corvette recounted how, at Love's suggestion or with his approval, he and others had committed robberies of competing drug dealers and others who, it was thought, would not contact the authorities for fear of having to expose their own unlawful acts. Bruce Bannister, Bruce DeWitt, and Bruce Schultz, all testified for the Government pursuant to plea agreements, and explained how the robberies were planned and committed and how the proceeds were divided between themselves and Love.

Elmer Charles Dalton and James Milton King also testified for the Government pursuant to plea agreements. They described how they had been introduced to Love by Youngblood and how between September 1980 and January 1981, they had participated in a number of interstate marijuana and cocaine sales.

Corvette also testified about how, in the latter part of 1982, Youngblood and Love had sought to import marijuana and cocaine from Colombia to South Carolina by airplane but how not a single flight had gone according to plan or had otherwise succeeded in its purpose.

First, Corvette described the "Owens Field Episode." Although the plane had been scheduled to land on the Blaney Drag Strip in Kershaw County, it had landed instead at Owens Airfield loaded with 541 pounds of marijuana which the DEA had promptly discovered and seized (R. 6-184).

Next, Corvette described how he had learned that although a plane had taken off from premises known as the Lee farm, en route to South America, that plane had crashed off the coast of Florida.

Following this mishap, Corvette learned of another smuggling venture involving a stolen airplane. The plane was to land at the Lee farm loaded with 1200 to 1500 pounds of marijuana from Colombia, South America. Corvette, however, later learned that the plane had run out of gas and had landed instead at Sarasota, Florida, where it was immediately discovered by the DEA (R. 4-135-139).

Finally, Corvette recounted how he had been informed of yet another plane which would carry marijuana and how elaborate plans had been undertaken in anticipation of the plane landing at Sumter Airport. Corvette discovered, however, that the plane had "blown up in South America" (R. 4-175).

From the testimony of convicted felon and DEA informant, Frank George Kelly, it was apparent that the DEA had kept abreast of the Petitioners' activities and by December 20, 1982, the DEA in South Carolina had been thoroughly alerted to the flight of a certain Cessna aircraft (R. 6-250).

That evening, the plane was, in fact, cited on a remote runway at Sumter Airport. DEA agents swarmed to the unoccupied aircraft and found on board 20 duffel bags containing 955.1 pounds of cocaine and what were alleged to be the personal effects of Lee.

Less than a mile away from the airport, Lee was discovered driving a vehicle and was arrested. Later that evening, while stationed at the Lee farm, DEA agents

observed a car driven by Love, with Youngblood as a passenger, pull onto the premises. Upon identifying themselves, they were detained and then arrested by the DEA.

B. The Defense Case.

(a) Love

After the Government had rested and the respective motions made by the appellants to dismiss the indictment had been denied, Love, 48 years of age, testified in his own behalf (R. 12-183-258).

Love stated that for 25 years, he had been in the used car business. He denied that he had been approached to sanction robberies and denied that he had shared in the proceeds of robberies. He further denied that he had used or sold drugs.

Love stated that in December, he had purchased 20 pounds of shelled pecans from Youngblood, which he was going to give away at Christmas. On December 20, he had called Youngblood to find out about the pecans. She, in turn, told him that she had received a call indicating that there was lots of activity at the Lee farm and had asked Love to drive there with her. When they reached the farm, they were arrested.

Eight witnesses testified for Love, including his wife of 28 years. Through the testimony of these witnesses, Love essentially attempted to discredit Corvette and the other cooperating defendants who were testifying for the Government pursuant to plea agreements and to establish that his character and reputation for truth and honesty in the community was good.

(b) Youngblood

Youngblood did not testify in her own defense and called no witnesses.

REASONS FOR GRANTING THE WRIT

When Viewed in Its Entirety, the Charge to the Jury by the Trial Judge Deprived the Petitioners of a Fair Trial and Due Process of Law.

As will be demonstrated, each assignment of error identified below is contrary to fundamental fairness. When evaluated cumulatively, these assignments of error are so pervasive and so egregious as to cut to the very vitals of due process of law as guaranteed by the Fifth Amendment.

A. Intent

As part of his charge on the crucial element of "intent," the trial judge instructed the jury as follows:

> "*Now you must consider it reasonable to draw the inference and find that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted.* You may draw the infe ence that a defendant intended all of the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any intentional act or conscious omission" (emphasis supplied R. 15-59).

The above instruction, of necessity, shifted the Government's burden of establishing the crucial element of "intent" and, therefore, prevented the Petitioners from receiving a fair trial and due process of law. *Francis v. Franklin,* ____ U.S. ____ , decided April 29, 1985 (37 Cr.L. 3019), *Sandstrom v. Montana,* 442 U.S. 510, 99 S.Ct. 2540 (1979).

The Petitioners did not object at trial to the above-quoted language of the trial judge. However, when judged by any standard of fundamental fairness, the instruction was so egregious as to constitute "plain error." Moreover, the instruction could not be deemed to constitute "harmless error." *Connecticut v. Johnson,* 460 U.S. 73 (1983), 103 S.Ct. 969.

It is axiomatic in a criminal case, a plea of not guilty, as here, puts in issue all elements of the offenses charged, including "intent" and requires the Government to establish each of those elements beyond a reasonable doubt. *Guthrie v. Warden, Maryland Penitentiary*, 683 F.2d 820 (4th Cir. 1982).

By charging the jury, *"you must consider it reasonable to draw the inference and find that . . ."* the trial judge created a mandatory presumption with respect to the critical element of "intent" and thereby reduced the Government's burden of proof below the constitutionally required standard of "beyond a reasonable doubt." Indeed, by his instruction, the trial judge literally directed a verdict in favor of the Government on the issue of intent; (i.e.) by admonishing the jury that they *must consider reasonable* the proffered inference, the trial judge eliminated the Government's burden of establishing the cardinal element of "specific intent" as to each and every count charged.

That such mandatory language was followed by the sentence "you may draw the inference . . ." simply does not, as this court recognized in *Francis v. Franklin, supra,* diminish the effect of the preceding mandatory language. As Justice Brennan, speaking for the majority in *Francis v. Franklin, supra,* noted:

> "When combined with the immediately preceding mandatory language, the instruction that the presumptions 'may be rebutted' could reasonably be read as telling the jury that it was required to infer intent to kill as the natural and probable consequence of the act of firing the gun unless the defendant persuaded the jury that such an inference was unwarranted" (37 Cr.L. 3022).[3]

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[3] In its opinion, the Court of Appeals failed to cite *Francis v. Franklin, supra,* decided by this Court on April 29, 1985, which followed the submission of briefs and oral argument in the Court of Appeals. Inasmuch as the Court of Appeals had apparently failed to consider this court's holding in *Francis v. Franklin, supra,* the Petitioners jointly petitioned for rehearing with suggestion for rehearing in banc. The relief sought by the Petitioners was, however, denied by the Court of Appeals. (Appendix B at 28a.)

In addressing the Petitioners' contention that the trial judge had, in fact, created a mandatory presumption, the Court of Appeals in its opinion held that the charge "merely instructed the jury as to what a reasonable inference would be" and, therefore, did not constitute a burden-shifting presumption as condemned by this court in *Sandstrom v. Montana, supra,* and *Connecticut v. Johnson, supra.* We submit that in so concluding the Court of Appeals abridged the petitioners' constitutional right to due process of law.

B. Reasonable Doubt

The trial judge defined "reasonable doubt" as one that,

> "exists in any case when after a careful and impartial consideration of all the evidence, you the jury does [sic] not feel convinced to a reasonable moral certainty that a defendant is guilty of the charges" (R. 15-13).

The use of "moral certainty" language to explain the requisite standard of proof in a criminal case has been severely condemned in numerous circuits. *United States v. Drake,* 673 F.2d 15 (1st Cir. 1982); *United States v. Previte,* 648 F.2d 73 (1st Cir. 1981); *United States v. Ariza-Ibarra,* 605 F.2d 1216 (1st Cit. 1979); *United States v. Lawson,* 507 F.2d 433 (7th Cir.), *cert. denied,* 95 S.Ct. 1446 (1975); *United States v. Byrd,* 352 F.2d 570 (2d Cir. 1965).

The trial judge further charged the jury that,

> "proof beyond a reasonble doubt is established if the evidence is such as you would be willing to rely and act upon in the more important affairs of your own life" (R. 15-11).

Numerous circuits have criticized the comparison of a "reasonable doubt" to transactions in a juror's "own life" as "trivializing" the constitutionally required burden of proof. *Dunn v. Perrin,* 570 F.2d 21 (1st Cir.), *cert. denied,* 437 U.S. 910 (1978); *United States v. Lawson,*

supra; Scurry v. United States, 347 F.2d 468, 470 (D.C. Cir. 1965); *United States v. Magnano,* 543 F.2d 431 (2d Cir. 1976); and *United States v. Hall,* 525 F.2d 1254 (5th Cir. 1976).

Neither the "moral certainty" language nor the juror's "own life" instruction were objected to by the Petitioners at trial. Nevertheless, the Petitioners submit that since the language charged by the trial judge had the inevitable effect of confusing the jury by suggesting a standard of proof below the constitutionally mandated requirement of "beyond a reasonable doubt," the trial judge committed "plain error."

In passing upon the Petitioners' "plain error" claims, the Court of Appeals specifically stated that,

> "... we cannot endorse the district court's attempt to define reasonable doubt . . ." (Appendix A at 16a).

The Court of Appeals, however, went on to conclude that "plain error" had not been committed by the trial judge so as to require reversal. On the facts at bar, this conclusion is erroneous as a matter of law.

Equally erroneous is the conclusion of the Court of Appeals that the trial judge did not commit "plain error" by admonishing the jury in his charge that,

> "If a defendant be proved guilty, say so; if not proved guilty, say so" (R. 15-62).

The "say so, say so" instruction clearly intruded upon the Petitioners' constitutional right to be proven guilty beyond a reasonable doubt. *United States v. Partin,* 552 F.2d 621 (5th Cir. 1977); *United States v. Cummings,* 468 F.2d 274 (9th Cir. 1972); *United States v. Thomann,* 609 F.2d 560 (1st Cir. 1979).

Indeed, the charged language had been condemned virtually word for word in *United States v. Partin, supra,* in 1977.

C. Credibility of Witnesses

In that portion of his charge on "credibility of witnesses," the trial judge stated,

> "If you find the presumption of truthfulness to be outweighed as to any witness, you will give the testimony of that witness such credibility, if any, as you think it deserves." (R. 15-13).

The Petitioners assert that there is no "presumption" of truthfulness. Indeed, such language conflicts with the constitutionally mandated presumption of innocence with which every defendant in a criminal trial is accorded. *United States v. Evans,* 398 F.2d 159 (3rd Cir. 1968); *McMillen v. United States,* 386 F.2d 29 (1st Cir. 1967); *Stone v. United States,* 379 F.2d 146 (D.C. Cir. 1967).

In addressing the Petitioners' claim relating to the portion of the charge concerning "credibility," the Court of Appeals specifically stated that,

> "This court has long held that the instruction that a witness is presumed or assumed to tell the truth is improper" (Appendix A at 14a).

The Court of Appeals, nevertheless held that since the Petitioners registered no objection to the "credibility" charge, review was precluded. The Petitioners submit that the "credibility" language complained of was so fundamentally erroneous even in the absence of an objection as to constitute "plain error."

D. Mere Presence

In charging the doctrine of "mere presence," the trial judge stated as follows:

> "I would instruct you that mere presence at or near the scene of a crime, or where a crime was supposed to be committed, is insufficient to establish that a defendant joined a conspiracy or aided or abetted in the commission of the crime. If you

> should find that *Ruis or Restrepo*[4] were not wilfully part of the conspiracy, or that they were -- and that they were merely present near where the crime was committed, then it would be your duty to find them not guilty" (emphasis supplied, R. 15-60).

In point of fact, Youngblood had specifically submitted to the trial judge six charges on "mere presence and mere association" and when the trial judge directed his charge solely to Ruiz and Restrepo, the Petitioners duly objected but to no avail (R. 15-83).

The inevitable effect of the trial judge's charge was, of course, to unmistakably convey to the jury that, as a matter of law, solely Ruiz and Restrepo -- both of whom were acquitted -- were entitled to the "mere presence" charge and that the doctrine had absolutely no application to the Petitioners.

In addressing the Petitioners' "mere presence" claim, the Court of Appeals specifically acknowledged that,

> ". . . it might have been preferable for the trial court to have kept his instructions more broadly constructed . . ." (Appendix A at 11a-12a).

Nevertheless, the Court of Appeals held that the "mere presence" charge did not prejudice the Petitioners or confuse the jury. On the facts at bar, this ruling is erroneous.

As we have sought to demonstrate above, the charge of the trial judge was concededly riddled with error. Indeed, although the Court of Appeals affirmed the Petitioners' judgment of conviction, the Court categorically observed again and again that the trial judge had utilized language in his charge which an appellate court could not sanction but which, because of the lack of objection by trial counsel, would not result in a reversal of the Petitioners' conviction.

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[4] As aforestated, Restrepo and Ruiz were acquitted of all counts.

In *In re Winship*, 397 U.S. 358, 364 (1970), 90 S.Ct. 1068, this court aptly observed that the Due Process Clause,

> "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

Plainly and simply put, the trial judge's charge made a mockery of this "bedrock, 'axiomatic, and elementary'" (constitutional) principle. (*Id.* at 363).

In the quintessentially critical areas of "intent," "reasonable doubt," "credibility" and "mere presence" the trial judge's charge was erroneous and the Court of Appeals, itself, clearly recognized that on "reasonable doubt," "credibility" and "mere presence" that trial judge had, in fact failed to appropriately charge the jury. When considered in its entirety, the magnitude of the trial judge's incorrect charge reached the very vitals of the criminal process. Indeed, in a criminal trial, what can be more critical than areas such as "reasonable doubt" and "credibility"?

In the case at bar, draconian sentences were meted out. Youngblood received a prison term of 35 years; Love, who is 48 years old, received a prison term of 70 years. Under the totality of circumstances, the doctrine of "plain error" was manifestly applicable and should have been applied by the Court of Appeals to remedy a fundamental miscarriage of justice.

CONCLUSION

FOR THE FOREGOING REASONS, A WRIT OF CERTIORARI SHOULD ISSUE TO REVIEW THE JUDGMENT OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Respectfully submitted,

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APPENDICES

Appendix A
Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 83-5171(L)

United States of America,

Appellee,

versus

Newby Franklin Love,

Appellant.

No. 83-5172

United States of America,

Appellee,

versus

Newby Franklin Love,

Appellant.

No. 83-5173

United States of America,

Appellee,

versus

Robert Edward Lee,

Appellant.

Appendix A
Opinion of United States Court of Appeals

No. 83-5174

United States of America,

Appellee,

versus

Sue Robinson Youngblood,

Appellant.

No. 84-5262

United States of America,

Appellee,

versus

Robert Edward Lee,

Appellant.

Argued: November 1, 1984 Decided: July 3, 1985

Appeal from the United States District Court for the District of South Carolina, at Columbia. Charles E. Simons, Jr., District Judge. (CR 83-20, CR 83-22)

Before ERVIN and WILKINSON, Circuit Judges, and MICHAEL, United States District Judge for the Western District of Virginia, sitting by designation.

Jack B. Swerling, J. Edward Bell, III; John L. Pollok (Edward Gasthalter on brief) for Appellants; Cameron B. Littlejohn, Assistant United States Attorney; David J. Slattery, Assistant United States Attorney (Henry Dargan McMaster, United States Attorney; Sylvia K. Amaker, Paralegal Specialist on brief) for Appellee.

Appendix A
Opinion of United States Court of Appeals

ERVIN, Circuit Judge:

Newby Franklin Love, Sue Robinson Youngblood, and Robert Edward Lee appeal from their convictions after a two-week jury trial on a nineteen-count superseding indictment alleging various drug related offenses. Specifically, the three appellants were convicted of violating the federal racketeering statute, 18 U.S.C. § 1962(c), (d) (1982), (i.e. the "RICO" statute) together with various federal drug laws, 21 U.S.C. § 841(a)(1), 846, 952(a), 960, 963 (1982).[1] In addition, Love and Youngblood were also convicted of violating the Travel Act, 18 U.S.C. § 1952(a)(3)(1982), and of transporting stolen aircraft in interstate commerce in violation of 18 U.S.C. § 2313 (1982).[2] Love was also convicted of wilfully and knowingly engaging in a continuing criminal enterprise

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[1] The three appellants were convicted of engaging in an enterprise conducting a pattern of racketeering activity in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO") 18 U.S.C. § 1961 (Count 1); conspiracy to import and conspiracy to possess marijuana and cocaine with intent to distribute in violation of 21 U.S.C. §§ 963, 846 (Counts 2 and 3); two counts of attempted importation of marijuana and cocaine in violation of 21 U.S.C. §§ 952(a), 960, 963 and 18 U.S.C. § 2 (Counts 13 and 17); and two counts of attempted possession of marijuana and cocaine with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1), 846 and 18 U.S.C. § 2 (Counts 14 and 18).

[2] Love and Youngblood were convicted of two counts of importation of marijuana in violation of 21 U.S.C. §§ 952(a) and 960 and 18 U.S.C. § 2 (Counts 5 and 7); two counts of possession of marijuana with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1), 846 and 18 U.S.C. § 2 (Counts 6 and 8); an additional count of attempted importation of marijuana in violation of 21 U.S.C. §§ 952(a), 960, 963 and 18 U.S.C. § 2 (Count 10); an additional count of attempted possession of marijuana with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1), 846 and 18 U.S.C. § 2 (Count 11); and transportation of a stolen aircraft in interstate commerce in violation of 18 U.S.C. §§ 2312, 2 (Count 12). In addition, Love was convicted of two separate counts (Counts 4 and 9) and Youngblood of one single count (Count 16) of traveling or causing others to travel in interstate commerce with the intent to facilitate the importation and possession of controlled substances with intent to distribute in violation of 18 U.S.C. § 1952(a)(3).

("CCE") in violation of 21 U.S.C. § 848. [3] The three appellants were also acquitted on some of the counts charged against them. [4] Each appellant received substantial sentences. [5]

Appellants now assert a number of different grounds for reversal on appeal. After careful consideration of each allegation of trial error, we are convinced that reversal is not required. Consequently, we refuse to disturb the appellants' convictions and affirm the judgments of the district court.

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[3] Count 19.

[4] Love was acquitted of Count 15 (obstruction of justice); Lee was found not guilty of Counts 10 and 11 (attempting to import and attempting to possess 1600 pounds of marijuana with intent to distribute); a directed verdict was entered as to Youngblood on Count 19 (Continuing Criminal Enterprise); and co-defendants Ruiz and Restrepo were acquitted on all charges.

[5] Love was sentenced to 50 years imprisonment on Count 19 (CCE), 20 years imprisonment on Count 1 (RICO) to run consecutively to the term in Count 19, and 5 years imprisonment on Count 12 (transporting stolen aircraft in interstate commerce) to run concurrently with the other sentences imposed, for a total sentence of 70 years imprisonment. Love was not sentenced on any of the drug conspiracy or substantive counts because of the sentence imposed on the continuing criminal enterprise charge.

Youngblood was sentenced to 20 years imprisonment on Count 1 (RICO), 15 years imprisonment on Count 2 to run consecutively to the sentence in Count 1, 15 years imprisonment on Count 3 to run concurrently with the sentence imposed in Count 1, and 5 years imprisonment on each of Counts 5, 6, 7, 8, 10, 11, 12, 13, 14, 16, 17 and 18, to run concurrently with the other sentences imposed, for a total sentence of 35 years imprisonment. Youngblood also received a special parole term of 3 years.

Lee was sentenced to 20 years imprisonment on Count 1 (RICO), 15 years imprisonment on each of Counts 2 and 3 to run concurrently with the sentence in Count 1, and 5 years imprisonment and a special parole term of 25 years on each of Counts 13, 14, 17 and 18, to run concurrently with each other but consecutively to the sentence imposed in Count 1, for a total sentence of 25 years plus a special parole term of 25 years.

Appendix A
Opinion of United States Court of Appeals

I.

FACTUAL BACKGROUND

At the outset, it should be noted that the arrests of the appellants culminated an extensive investigation carried on over several months by federal and state agents in South Carolina, Georgia, and Florida. The facts of this case are very complex as they involve many separate incidents which together comprise the basis for the appellants' arrests and convictions. As a consequence, only the facts pertinent to this appeal will be summarized. For our purposes, the appellants' illegal activities may be separated into three broad categories: (1) the drug-related activities of 1980-1981, (2) the armed robberies and cocaine trafficking in 1982, and (3) the drug smuggling operations in 1982.

A. *Drug-related activities of 1980-1981*

Love and Youngblood's 1980-1981 drug-related activities constitute the earliest overt acts upon which their Count 1 RICO conspiracy convictions are based. These activities revolve around their relationship with two drug dealers, Elmer Charles Dalton and James Milton King. Dalton and King were involved in a number of profitable interstate cocaine and marijuana sales with Love between September 1980 and January 1981. Love sold Dalton and King large quantities of marijuana and cocaine for later resale and distribution on several different occasions during this period. Dalton and King had been introduced to Love by Youngblood who also was involved in at least one of these interstate drug transactions. Lee, however, was not implicated in any of these early drug activities.

B. *Armed robberies and cocaine trafficking in 1982*

Beginning some time prior to 1982, Youngblood and Love became engaged in a drug trafficking partnership in which Youngblood supplied Love with cocaine, which

she transported to South Carolina from Florida. Love then sold this cocaine to dealers throughout the region. This partnership eventually blossomed into the drug smuggling operations of June-December, 1982. In addition, Wilbur Rutledge "Rusty" Corvette and Ralph Bruce Bannister were hired by Love in 1982 to commit several robberies of competing drug dealers and other individuals who Love felt would be unlikely to report such crimes to the authorities. Corvette and Bannister usually sought Love's prior sanction of these robberies to insure that the victim was not a distributor of drugs supplied by Love. In most instances, Love furnished the weapons and vehicles used in the robberies and afterwards received jewelry or other proceeds of the crime. Youngblood was aware of these robberies and also received proceeds in at least one instance. [6] However, Lee was not involved in any of these robberies.

C. *Drug Smuggling Activities of 1982*

During the latter half of 1982, Youngblood and Love arranged several unsuccessful attempts to import marijuana and cocaine directly to South Carolina from Columbia. Their first smuggling venture was attempted in June of that year. At that time, Love told Corvette that he was planning to bring 1200 to 1500 pounds of marijuana to South Carolina from South America by plane. Together Love and Corvette went to Florida to meet Youngblood and discuss this operation. Soon after this meeting, they attempted the smuggling run and dispatched a plane to South America.

On June 15, 1982, Love, Corvette and Wayne Rodgers prepared to meet the marijuana-laden plane at a drag strip near Columbia on its return from South America. However, because of communications mishaps and lack of fuel, the plane did not land at the drag strip. Instead,

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[6] Youngblood received diamond earrings stolen in the robbery of Paul Shuping on July 31, 1982.

the plane was abandoned at a small airport in Columbia, South Carolina. It was found the next day by law enforcement officials. Examination of the plane revealed that its long-range fuel tanks contained only 8-10 gallons of fuel. In addition, its seats had been removed, and there were 18 bales of marijuana weighing 541 pounds on board. The landing flaps had not been closed and the door to the cockpit had been left ajar. Fingerprints taken from the fuselage and from food wrappers and navigational charts found in the cockpit subsequently were identified as those of Timothy Roy Rivera. Millard Waites, a convicted drug smuggler, testified at trial that prior to the flight he had given Rivera's name and telephone number to Love after Love asked him for the name of a pilot. Love subsequently hired Rivera for the smuggling job.

Several weeks after this failed attempt, Love told Corvette that he had obtained another plane for a smuggling trip to South America. Once again Rivera was to be the pilot for the Love-Youngblood smuggling operation. Once again, however, this run was aborted when the plane crashed on the way to South America.

Afterwards, in August, 1982, Love, Waites, Kenneth Davidson, Youngblood, Rivera, Rivera's brother, and Corvette met at Love's apartment to plan their next smuggling venture. As a first step, Youngblood, Rivera, and Rivera's brother stole a Cessna 404 Titan airplane from Trager Aviation Company in Lima, Ohio. After redesigning the plane to transport drugs, Rivera again piloted the plane to South America. John Furmen Walker, alias "Double R", accompanied him on this trip. Success eluded them another time, however, when they ran low on fuel during the return trip, and were forced to land in Sarasota, Florida. Although the police discovered the plane before they could unload the marijuana, Rivera and Walker were able to escape. The police discovered 46 bales of marijuana weighing 1594 pounds on board the plane when they arrived.

A fourth attempted smuggling run was scheduled for November, 1982. For this next venture, Love sought a pilot who could fly a large cargo plane. Love requested that Joe Merolla, the owner of the airplane leasing company Southern Aero Traders, ask Frank Kelly, an Opa Locka, Florida airport employee, to evaluate Rivera and another Colombian pilot from Southern Aero Traders to see if they could fly a large cargo plane. Unknown to Love, Merolla and Kelly were DEA informants. Kelly evaluated the two pilots and concluded that they could not fly large cargo planes. Youngblood then offered Kelly $50,000 to fly the plane to South America himself. Kelly accepted and was paid $5000 by "Double R". Kelly later met with "Double R", Youngblood and Love to discuss the details of the smuggling run. He learned that the first plane load would contain 4500 pounds of marijuana. That was to be followed by a load of cocaine two days later. At this meeting, Love told Kelly that the two Colombians had lost three of his planes while one of his Howard 250 aircraft had already made six successful trips to South America.

Following this meeting, appellant Lee came to Opa Locka to be Kelly's co-pilot. The trip was postponed several times as Kelly repeatedly tried to avoid making the trip. Finally Kelly, Lee, "Vargas" (a Colombian dealer) and "Double R" took off for South America. Kelly deliberately closed the flaps on the plane which caused the engine to overheat and forced them to land at New Smyrna Beach, Florida. After making repairs, Double R and Vargas then continued on to South America.

Meanwhile, Love and Corvette readied themselves for the arrival of the plane back in Sumter County with a group of ten men bearing machine guns and hand grenades. Love told Corvette that the extra men were there to fight the police if the need arose. A couple of days later, Love and Corvette learned that the plane had blown up after taking off with the marijuana on board in Colombia. Despite this fourth setback, Love and Young-

blood did not waste time in planning what was to be their fifth and final unsuccessful smuggling venture together.

In early December, 1982, Joe Merolla informed the DEA that Leo Rosquette and others were planning to smuggle 700 to 800 pounds of cocaine from Colombia to Love in South Carolina around December 20, 1982. Merolla kept the DEA apprised of this venture daily since his company was installing long range fuel tanks in a plane the smugglers had just bought from him in Opa Locka for the smuggling trip. In addition, Merolla installed an electronic beeper on the modified plane to monitor its flight path once it was airborne.

On December 19, 1982, Lee flew the plane from Opa Locka to New Smyrna where he met Youngblood. He then flew on to South America. After the plane left New Smyrna Beach, federal and state officers set up surveillance teams at the Lee farm in Sumter County (the suspected primary landing site), the Sumter County airport, and the Walterboro airport. At 9:10 p.m. that evening, the Walterboro team heard the plane's beeper signal and radioed that the plane was heading for Sumter.

At some time after 9:00 p.m., the pilot of the plane called the Sumter airport for clearance to land. At trial, two men who knew Lee well identified the taped voice of the pilot as that of Lee. The plane then landed at the Sumter County Airport at 9:47 p.m. After the arrival of the Customs helicopter at 10:30 p.m., the airport surveillance team secured the area. The airport was sealed and a search ensued. At 10:45 p.m., defendant Gonzales-Fuentes was found hiding under a ledge in the shrubbery next to the terminal building and was arrested. He was carrying $4000 in cash, a passport and a round-trip ticket from Medellin, South America to Miami, Florida, on which the return trip had not been used. He also reeked of chemicals.

A search of the plane at the airport uncovered 20 duffel bags containing 955.1 pounds of cocaine with an estimated street value of $350 million. On top of the duffel bags was a clothes bag containing two letters addressed to Lee from his attorney, a monogrammed shirt with the initials "REL", a thermos bottle later determined to have Lee's fingerprints on it, aeronautical charts in Lee's handwriting and flight plans from Monteria, South America and Riohacha, South America to South Carolina.

Meanwhile, police officers at the Lee farm stopped a motor home and arrested its occupants, defendants Ruiz and Restrepo. At the same time, officers stopped a pickup truck with a camper in tow on an access road at the end of the Sumter County runway. The driver was Lee. He appeared exhausted and reeked of chemicals.

Later that night, at approximately 2:15 a.m., Love and Youngblood drove to the Lee farm which by now was secured by agents, and parked in the carport. Agents immediately converged on the car to prevent the appellants from leaving. Upon learning that the occupants of the car were Youngblood and Love, the agents patted Love down and made a cursory search of both the car area where he was sitting and of Youngblood's purse. Agent Hill advised Love that he and Youngblood could leave if they helped the officers determine that they were at the farm innocently and were not involved in the drug smuggling operation. However, the two appellants did not offer any explanation for their presence. Agent Pittard, aware that Love might be involved in the smuggling operation, advised his superior officers that Love had arrived at the farm. He was subsequently directed to detain Love and Youngblood until the agents in charge of the investigation arrived. Pittard did so and informed Love that agents would soon arrive to charge him with narcotics violations. Soon thereafter, Youngblood and Love asked for permission to use the restroom. Although Pittard told them they could enter the house, the appel-

lants said they preferred to relieve themselves outdoors. Love went to a nearby tree while Youngblood went to some bushes several yards away. Some twenty minutes later, Agents Stewart and Shumard arrived and placed the appellants under arrest. After his arrival, Agent Hill went to the bushes where Youngblood had gone and discovered several packages containing cocaine. In addition, he found several torn-up pieces of paper. Agent Pittard also found torn-up papers near the tree where Love had gone to relieve himself.

These papers included the telephone numbers of "Double R" and Lee. An examination of Youngblood's address book also revealed the telephone numbers and addresses for Rusty Corvette, Rivera, Tom and Joe Merolla (Southern Aero Traders), "Double R", Kenneth Davidson, Frank Kelly, "Leo", and Robert Lee. In addition, when Lee was arrested, he had Youngblood's Richmond Hill telephone number on a slip of paper. It was later determined that a collect call had been made from the pay phone at the Sumter airport to Youngblood's home in Richmond Hill, Georgia, at 10:25 p.m. on December 20, 1982.

The Lee farm was searched pursuant to a search warrant on December 23, 1982. Found in the house were an aircraft radio transceiver, a "blue box" radio, two walkie-talkies, a hand-drawn map of the Carribbean and part of South America, and a book entitled "The Smuggling Business." A large antenna was also found on the house roof. In addition, six airplane seats were found stored in a truck behind the residence and several old tires were found in an outside storage area.

Because we believe the various issues presented for our consideration on this appeal have little merit, we will discuss each only briefly.

Appendix A
Opinion of United States Court of Appeals

II.

Jury Instructions

Love, Youngblood and Lee attack the trial court's jury instructions on a number of grounds. We will address each in turn.

A. The doctrine of mere presence

The appellants first contend that the trial court's charge regarding the doctrine of mere presence unfairly focused on defendants Ruiz and Restrepo to the appellants' detriment. [7] We disagree. The district court was very careful to explain to the jury that a criminal defendant's mere presence at the scene of the crime or his knowledge of that crime is insufficient to establish that he joined a conspiracy or aided and abetted in the commission of the crime. Instead, the defendant's active, knowing participation is required before a conviction may be entered. *See United States v. Weil*, 561 F.2d 1109, 1112 (4th Cir. 1977).

At no time did the district court below suggest to the jury that the appellants could not be found to have been merely present at the scene of the crime and hence not guilty. [8] Although it might have been preferable for the

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[7] The trial court gave the following instruction regarding "mere presence":

> I would instruct you that mere presence at or near the scene of a crime, or where a crime was supposed to be committed, is insufficient to establish that a defendant joined a conspiracy or aided and abetted in the commission of the crime. If you should find that Ruiz and Restrepo were not willfully part of the conspiracy, or that they were – and that they were merely present near where the crime was committed then it would be your duty to find them not guilty.

[8] In addition to the "mere presence" instruction in footnote 7, the trial court also instructed that:

> Mere association between a principal and the accused of aiding and abetting is not sufficient to establish guilt, nor is

(Footnote continued on following page)

trial court to have kept his instructions more broadly constructed, this aspect of the jury charge did not in any way prejudice the appellants by misleading or confusing the jury. *See United States v. Moss,* No. 83-5301, Slip Op. at 10-11 (4th Cir. March 7, 1985).

B. Intent

Appellants next contend that the trial court's instructions created a mandatory presumption with respect to the element of intent and thereby reduced the government's burden of proof below the constitutionally required "beyond all reasonable doubt" standard.[9] *See In re Winship,* 397 U.S. 358 (1970). The Supreme Court has consistently condemned the use of conclusive presumptions regarding disputed elements of a particular crime because "[t]o allow a reviewing court to perform the jury's function of evaluating the evidence . . . when the jury never may have performed that function, would give too much weight to society's interest in punishing

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mere presence at or near the scene, or even knowledge that the crime was being committed, sufficient, standing by itself, to establish aiding and abetting. Neither can a person be found guilty of aiding and abetting a crime that has already been fully committed. However, a defendant who willfully joined in the commission of an offense before its full completion may be found guilty as an aider and abettor.

Additionally, the trial court fully instructed the jury that each element of each crime must be proven beyond all reasonable doubt and that each defendant must have been an active, willful participant in the wrongdoing in order for guilt to be established.

[9] The appellants challenge the trial court's instruction that:

"Now you must consider its [sic] reasonable to draw the inference and find that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. You may draw the inference that a Defendant intended all of the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any intentional act or conscious omission."

the guilty and too little weight to the method by which decisions of guilt are to be made." *Connecticut v. Johnson,* 460 U.S. 73, 103 S.Ct. 969, 74 L.Ed.2d 823 (1983); *see also Sandstrom v. Montana,* 442 U.S. 510 (1979); *Tweety v. Mitchell,* 682 F.2d 461 (4th Cir. 1982), *cert. denied,* 460 U.S. 1013 (1983). Nevertheless, the instruction in this case did not "create a conclusive or burden shifting presumption on intent" in the manner of the instructions condemned in *Sandstrom* and *Johnson.* Instead, the charge merely instructed the jury as to what a reasonable inference would be. The individual jurors were not required to draw any inference. Given the district court's explanation of both the element of intent and its instruction reflecting the government's need to prove all the elements of the alleged crimes, including intent, beyond all reasonable doubt, we believe the charge, taken as a whole, did not create a conclusive presumption regarding intent nor constitute reversible error. *See United States v. Arthur,* 544 F.2d 730 (4th Cir. 1976) ("An instruction that it is reasonable to *infer* that a person ordinarily intends the natural and probable consequences of his voluntary acts has generally been held proper.").

C. Credibility of Witnesses

The appellants next challenge that portion of the district court's charge relating to the credibility of witnesses. Specifically, they object to the trial court's instruction that:

> "If you find the presumption of truthfulness to be outweighed as to any witness, you will give the testimony of that witness such credibility, if any, as you may think it deserves."

This court has long held that the instruction that a witness is presumed or assumed to tell the truth is improper. *See United States v. Safely,* 408 F.2d 603 (4th

Cir.), *cert. denied,* 395 U.S. 983 (1969). We reiterated this point most recently in *United States v. Varner,* 748 F.2d 925 (4th Cir. 1984) in holding such an instruction to be erroneous and remanding that case for a new trial. In *Varner,* the defendant objected to the instruction at the trial below. In this case, however, no objection to this part of the charge was made. This failure to object precludes our review of the challenged instruction unless it constitutes "plain error". In *United States v. Safely, supra,* we considered whether a "presumption of truthfulness" instruction such as the one tendered here constituted plain error. We held that it did not. *Safely* governs our disposition of this issue on appeal today. The trial court did not commit plain error by issuing this instruction.

D. Other challenged instructions

Appellants also contend that the district court's charge relating to the definition of reasonable doubt constituted plain error necessitating a reversal of their convictions. [10] We begin by noting that "attempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury". *Smith v. Bordenkircher,* 718 F.2d 1273, 1276 (4th Cir. 1983), *cert. denied,* 104 S.Ct. 2355 (1984) (quoting *Holland v. United States,* 348 U.S. 121, 140 (1954)). As a result, this court has repeatedly joined "in the general condem-

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[10] In particular, the appellants object to that part of the trial court's charge instructing that reasonable doubt

> exists in any case when after a careful and impartial consideration of all the evidence, you the jury does [sic] not feel convinced to a reasonable moral certainty that a Defendant is guilty of the charges.

In addition, the appellants challenge the instruction that:

> Proof beyond a reasonable doubt is established if the evidence is such as you would be willing to rely and act upon in the more important affairs of your own life.

nation of trial court attempts to define reasonable doubt in their jury instructions." *United States v. Moss,* No. 83-5301, slip op. at 9. *See also, e.g., Smith v. Bordenkircher,* 718 F.2d at 1276; *Whiteside v. Parke,* 705 F.2d 869, 871 (6th Cir.), *cert. denied,* 104 S.Ct. 141 (1983); *United States v. Martin-Trigona,* 684 F.2d 485, 493 (7th Cir. 1982); *Dunn v. Perrin,* 570 F.2d 21, 23 (1st Cir.), *cert. denied,* 437 U.S. 910 (1978). Nevertheless, we have recognized that "[m]ere attempts to define reasonable doubt do not . . . constitute reversible error per se." *Moss, supra,* at 9. While we cannot endorse the district court's attempt to define reasonable doubt, we are satisfied that the instructions in this case were not plain error and do not require reversal of the appellants' convictions. In no way were the instructions "misleading or confusing" and, viewed in the context of the charge as a whole, "correctly convey[ed] the concept of reasonable doubt." *Id.* Consequently, the challenged instructions regarding reasonable doubt are not sufficiently prejudical to warrant reversal.

In addition, appellants challenge the trial court's instruction that "If a Defendant be proven guilty, say so; if not proved guilty, say so." We conclude that this instruction does not constitute plain error in light of the district court's ameliorating instruction squarely placing the burden on the government to prove the defendant guilty of the crimes charged beyond all reasonable doubt. Finally, we are convinced that the district court's instructions regarding "attempt" and "aiding and abetting" are both accurate and clear and do not constitute plain error requiring a reversal of the appellant's convictions.

III.

The Continuing Criminal Enterprise

Love attacks his conviction and resulting sentence under 21 U.S.C. § 848 on several grounds, none of which are meritorious. In particular, Love argues that the

district court's jury instruction regarding the continuing criminal enterprise count was improper. The challenged portion reads as follows:

> Thus you must find beyond a reasonable doubt that Defendant Love is guilty as charged in any of Counts 2, 3, 5, 6, 7, 8, 10, 11, 13, 14, 17 and 18, and that the conduct charged in any of these counts, *together with additional violations of the drug laws,* constituted a total of three or more violations of the federal drug laws committed over a period of time with a single or similar purpose. This will constitute a finding that the Defendant Love engaged in a continuing series of violations (A. 142). (emphasis added)

Love argued that the use of the term "drug laws" enabled the jury to consider as predicate offenses under Section 848 crimes not included in that section, i.e., non-subchapter I or II offenses.[11] However, we believe that in the context of this charge the language "additional violations of the federal drug laws" referred to felony drug offenses not specifically charged as substantive counts but on which evidence had been presented. These offenses, plus

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[11] 21 U.S.C. § 848(b) reads as follows:

> (b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if –
>
> (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and
>
> (2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter –
>
> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
>
> (B) from which such person obtains substantial income or resources.

the counts listed in the charge, all contemplated crimes under subchapters I or II and were the only offenses which could be considered in establishing the three violations necessary to support a continuing criminal enterprise conviction. Consequently, the district court committed no error in giving this instruction.[12]

In addition, Love argues that he was improperly convicted and sentenced under both RICO and Section 848. We disagree. These statutes contemplate separate and distinct offenses which may be punished separately. *See United States v. Phillips*, 664 F.2d 971, 1010-14 (5th Cir. 1981), *cert. denied. sub nom. Meinster v. United States*, 457 U.S. 1136, *sub nom. Platshorn v. United States*, 459 U.S. 906 (1982).[13]

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[12] Love contends that the offenses alleged in counts 4 and 9, i.e. traveling in interstate commerce and engaging others to travel in interstate commerce with the intent of carrying on and facilitating the possession with intent to distribute of controlled substances, were impermissibly considered by the jury in its deliberation regarding the continuing criminal enterprise charge since they are offenses under Title 18, not subchapter I or II of Title 21. However, since the trial court specifically omitted these counts in his instruction to the jury on count 19, it is unreasonable to conclude that the term "drug laws" could then be understood to re-include those counts.

[13] We agree with the Fifth Circuit's reasoning in *Phillips*, 664 F.2d at 1013-14:

> We conclude that the RICO counts are not lesser included offenses of the § 848 count. Both the substantive RICO and RICO conspiracy counts require proof of facts and elements not required to be proved under § 848, even though there is a substantial overlap in the proof offered to establish the crimes. In a substantive or conspiracy RICO prosecution the Government must prove the existence of an enterprise that affects interstate commerce. The existence of an enterprise is an element that is separate from the element of the pattern of racketeering activity in which the enterprise engages; the enterprise is proved by evidence of a continuing organization and by evidence that the members function as a continuing unit. *United States v. Turkette, supra*, 101 S.Ct. at 2528. Mere

(Footnote continued on following page)

IV.

Multiplicitous Counts

The appellants argue that several counts in their indictment were improperly multiplicitous. We disagree. The Supreme Court has determined that conspiracies and the substantive offenses committed in the course of those conspiracies are separate offenses and may be charged separately. *Callanan v. U.S.*, 364 U.S. 587 (1960); *Iannelli v. U.S.*, 420 U.S. 770 (1975). In this indictment, count 2 charged the appellants with conspiring to import and attempting to import controlled substances. Counts 7, 10, and 13 charged the appellants with attempting to import specific planeloads of controlled substances. The latter three counts are substantive offenses separate from the conspiracy count and may be charged independently under *Callanan*. Similarly, count 3 charged the appellants with conspiracy to possess and attempt to

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proof of a pattern of racketeering activity, i.e., commission of at least two acts of racketeering activity, is not sufficient to establish a RICO violation; there must also be proof of the existence of the enterprise itself. Section 848, by contrast, does not require proof of a RICO type enterprise. Rather § 848 merely requires proof that the defendant undertook a continuing series of violations in concert or in conspiracy with five or more persons.

Proof of a § 848 conspiracy does not establish proof of every fact and element necessary to show a RICO conspiracy violation. The object of a RICO conspiracy, as this Court stated in *United States v. Elliott*, [571 F.2d 880, 902], is to violate a substantive RICO provision, not merely to commit each of the predicate crimes constituting a pattern of racketeering activity. The gist of a RICO offense is that the defendant furthered a racketeering enterprise through a pattern of racketeering activity; a RICO count charges not the commission of the predicate crimes but rather the furthering of the enterprise. *United States v. Bright*, [630 F.2d 804, 813]. The object of a § 848 conspiracy could be merely to commit the particular narcotics violations which taken cumulatively constitute a continuing series of violations.

possess narcotics with the intent to distribute. Counts 8, 11, and 14 charged the appellants with attempting to possess narcotics with the intent to distribute. Under *Callanan,* counts 8, 11, and 14 are specific substantive offenses charged separately from the overall conspiracy. These counts at issue are therefore not multiplicitous.

V.

Double Jeopardy

Youngblood and Lee were convicted on count 1 of conspiracy to violate the RICO statute, on count 2 of conspiracy to import drugs and on count 3 of conspiracy to possess drugs with the intent to distribute. They contend that all three conspiracies were "identical in goals, participants, time span and substantive crimes committed." Therefore, they assert that conviction and sentencing for all three constitute multiple punishments for the same crime in violation of the double jeopardy clause of the Constitution. *See North Carolina v. Pearce,* 395 U.S. 711, 717 (1969). We disagree.

Each conspiracy conviction involves an element of proof not required by the others. *See United States v. Blockburger,* 284 U.S. 299 (1932). A conviction for conspiracy to import does not require proof of conspiracy to possess and distribute. Neither proof of importation nor possession is required for a RICO conviction. In addition, these RICO convictions included armed robberies and Travel Act violations as predicate offenses. Neither set of these offenses were elements of proof for the narcotics violations.

Separate offenses involving the same or similar acts which violate different statutes may be charged and sentenced separately and consecutively. *See United States v. Albernaz,* 450 U.S. 333 (1981). Where a RICO conspiracy overlaps with other conspiracies, separate

convictions and sentences may be imposd for both conspiracies. *See United States v. Phillips,* 664 F.2d at 1010-1014. Consequently, we find no error in the conviction and sentencing of the appellants on counts 1, 2, and 3.

VI.

Constitutionality of Warrantless Arrest

Love and Youngblood argue that their arrest was constitutionally defective because they were arrested without a warrant. This argument is without merit. Based on the "totality of the circumstances," the government agents had valid probable cause to be stationed on Lee's premises. *See Illinois v. Gates,* 462 U.S. 213 (1983). In addition, the exigencies of the circumstances surrounding the appellants' apprehension necessitated a warrantless arrest. *Cf. Payton v. New York,* 445 U.S. 573 (1980) (*absent exigent circumstances,* an arrest in the home or curtilage area around the home must be accomplished by means of an arrest warrant.) Here, agents were properly stationed to apprehend those suspects who might surface at the primary landing site.

VII.

Other Alleged Trial Errors

A. Testimony of Agent Hill

The appellants contend that a mistrial should have been ordered after Agent Hill testified that Love and Youngblood made no effort to explain their presence at the Lee farm on the night of their arrest. We agree with the district court that a mistrial was not warranted. The Supreme Court held in *Doyle v. Ohio,* 426 U.S. 610 (1976) that testimony concerning a defendant's silence "at the time of arrest and after receiving *Miranda* warnings" is inadmissible. However, the Court has subsequently refined its rules in *Doyle* to permit testimony concerning

a defendant's silence where the defendant has not "received any *Miranda* warnings during the period in which he remained silent immediately after his arrest." *Fletcher v. Weir,* 455 U.S. 603 (1982); *see also Folston v. Allsbrook,* 691 F.2d 184, 187 (4th Cir. 1982), *cert. denied,* 103 S.Ct. 2111 (1983). In this case neither Love nor Youngblood had been given any *Miranda* warnings at the time Agent Hill observed their silence. As a result, under *Doyle* and *Fletcher,* Agent Hill's testimony was properly admitted.

B. The Testimony of Agent Shumard

The appellants argue that DEA Agent Shumard's testimony concerning information he received from a fellow DEA agent in Florida about proposed landing sites in South Carolina is inadmissible hearsay. We find this argument unpersuasive.

Fed. R. Evid. 801(c) defines an out of court statement as hearsay if it is "offered in evidence to prove the truth of the matter asserted." However, an out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken. *United States v. Scott,* 678 F.2d 606, 612 (5th Cir.), *cert. denied,* 459 U.S. 972 (1982); *see also United States v. Hunt,* 749 F.2d 1078, 1084 (4th Cir. 1984), *petition for cert. filed,* 53 U.S.L.W. 3703 (U.S. March 6, 1985) (No. 84-1481). In this case, Shumard's testimony was offered not for its truth but only to explain why the officers and agents made the preparations that they did in anticipation of the appellants' arrest. As such, it was not inadmissible hearsay. *See United States v. Mancillas,* 580 F.2d 1301 (7th Cir.), *cert. denied,* 439 U.S. 958 (1978) ("Whether or not the . . . statement was true, the fact that it was made would surely explain the flurry of investigative activity in three states the jury was soon to hear about. For this purpose, outlining the background of the

investigation with the evidence not being offered to prove its truth, it could be said not to be nonadmissible as hearsay." (citations omitted)).

C. The Telex

On December 17, 1982, the DEA office in Miami sent a telex to the DEA office in Columbia, South Carolina relating information it had received concerning this investigation. The sources of the information are not indicated in the telex. In brief, the telex stated that Leo Rosquette, a DEA fugitive, was planning to smuggle 900 pounds of cocaine by aircraft to an airfield controlled by Love near Columbia, South Carolina. The plane to be used was N3234D, then located at Southern Aero Traders in Opa Locka, Florida. The telex indicated that the plane was having long-range fuel tanks installed and would be ready to fly to South America on December 19, 1982. The telex also stated that Garrett Clark, another DEA fugitive was tentatively scheduled to be the pilot.

Lee contends that the district court's refusal to both admit the telex in evidence and allow full cross-examination concerning its contents was reversible error. We disagree. Regardless of the propriety of the trial court's decision, the error, if any, can only be considered harmless given the overwhelming evidence in the record implicating Lee and contradicting the "tentative" identification of Clark as the pilot in the telex.[14]

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[14] The evidence implicating Lee included the following:

1) Lee was identified as the pilot flying the plane (i.e. N3234D) from Opa Locka on December 19, 1982 North toward New Smyrna Beach; 2) Lee was identified as he sat on the patio at the airport ten minutes after the plane landed at New Smyrna Beach; 3) Lee was identified paying cash for the 40-45 gallons of fuel used to refuel the plane; 4) Lee's voice was identified as that of the pilot of N3234D on the night of December 20, 1982 by two law enforcement officers who had known Lee for 20 and 10 years respectively; 5) Lee was arrested on an access road at Sumter County airport that same night; 6) Lee

(Footnote continued on following page)

D. The Voice Spectrogram

As part of his defense at trial, Lee introduced the testimony of a voice identification expert, Dr. Henry Truby. Dr. Truby testified concerning spectrographic voice analyses he made comparing the tape recording of the pilot's voice with Lee's voice. Lee now argues on appeal that the trial court impermissibly commented to the jury on the credibility of this witness.

A federal district court has long had the authority to comment on the evidence introduced at trial. *See Quercia v. United States,* 289 U.S. 466 (1933). Such comments are permitted "to assist the jury in arriving at a just conclusion." *Anderson v. Warden, Maryland Penitentiary,* 696 F.2d 296, 299 (4th Cir. 1982), *cert. denied,* 103 S.Ct. 2463 (1983). As a result, we have held that "the judge's comments must be neutral and [are] not [to] be given so as to intimidate the witnesses or otherwise interfere with the ascertainment of truth." *Id.* at 299. A thorough review of this record has not uncovered any statements by the trial court which undermine his neutrality.[15] His

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was unshaven, exhausted and reeked of chemicals associated with cocaine at the time of his arrest; 7) the police found two letters addressed to Lee from his attorney, a monogrammed shirt with the initials "REL", a thermos bottle with Lee's fingerprints, aeronautical charts with Lee's handwriting and flight plans for Monteria, South America and Riohacha, South America to South Carolina inside the airplane with the duffel bags containing 955.1 pounds of cocaine; and 8) Garrett Clark was never mentioned as a participant in the activities of December 19-20, 1982.

[15] Even if we assume the district court did make tendentious comments at the time the expert was called, he corrected his error with an immediate ameliorating instruction:

> I'm not expressing any opinion as to – of my own. Of course if I did express an opinion, you would not be influenced in any degree by it because it's up to you. But I am going to let him testify as what we consider an expert witness. (Tr. 13-239, 13-240).

See U.S. v. Billups, 692 F.2d 320, 327 (4th Cir. 1982), *cert. denied,* 104 S.Ct. 84 (1983). (No error where "judge's curative instructions served to assist the jury in giving proper weight to his comments.")

charge to the jury concerning the voice spectrogram was fair if not totally neutral.[16] Therefore, the district court's comments regarding the voice spectrogram did not constitute reversible error.

E. Remaining Issues

Without discussing each allegation of error, we conclude after having carefully reviewed the record and the briefs that none of the appellants' remaining asserted trial errors are sufficiently meritorious to warrant reversal.

VIII.

CONCLUSION

Considering the complexity of this prosecution, a prosecution involving a two-week jury trial, testimony from 80 government witnesses and the introduction of 150 exhibits, we find particularly appropriate Judge Johnson's concluding remarks in *Phillips*, and adopt them as equally applicable to the facts of this case:

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[16] The trial court instructed the jury as follows:

> Now you will recall that a voice spectrogram was admitted into evidence. I charge you that the spectrogram was only a basis for the voice identification expert's opinion and you may disregard his testimony if you should conclude that his opinion was not based on adequate education, training or experience, or that his professed science or voice print identification was not sufficiently reliable, accurate, and dependable.
>
> Depending upon your view of the evidence, you are not obligated to accept the opinion of the voice identification expert if you do conclude the reasons supporting that opinion are not sound, or if contradictory evidence casts doubt upon it, or if you conclude that the methods used by the expert are not scientifically acceptable.

> As all experienced trial and appellate judges know, it is virtually impossible to conduct a trial free of some technical errors. This is particularly true in lengthy trials involving multiple defendants and attorneys, and numerous complex substantive and procedural problems. However, a defendant is entitled only to a fair trial, not a perfect one. We are convinced after careful and exhaustive review of the record that each of the defendants received a fair trial. (citations omitted)

664 F.2d at 1044.

For the foregoing reasons, the appellants' convictions are

AFFIRMED.

Appendix B
Order of United States Court of Appeals On Petition for Rehearing and Suggestion for Rehearing In Banc

No. 83-5171

United States of America,

Appellee,

versus

Newby Franklin Love,

Appellant.

No. 83-5172

United States of America,

Appellee,

versus

Newby Franklin Love,

Appellant.

No. 83-5173

United States of America,

Appellee,

versus

Robert Edward Lee,

Appellant.

No. 83-5174

United States of America,

Appellee,

versus

Sue Robinson Youngblood,

Appellant.

Appendix B
Order of United States Court of Appeals
On Petition for Rehearing and Suggestion for Rehearing In Banc

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No. 84-5262

United States of America,

Appellee,

versus

Robert Edward Lee,

Appellant.

Appeals from the United States District Court for the District of South Carolina, at Columbia. Charles E. Simons, Jr., District Judge

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The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Ervin, with the concurrence of Judge Wilkinson and Judge Michael, United States District Judge, sitting by designation.

For the Court,

/s/ _____

John M. Greacen
Clerk

Filed
July 29, 1985

FILED
DEC 19 1985
JOSEPH

(2) (2)

Nos. 85-526 and 85-576

In the Supreme Court of the United States

OCTOBER TERM, 1985

NEWBY FRANKLIN LOVE AND
SUE ROBINSON YOUNGBLOOD, PETITIONERS

v.

UNITED STATES OF AMERICA

ROBERT EDWARD LEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the jury instructions on intent, proof beyond a reasonable doubt, the credibility of witnesses, and the "mere presence" doctrine constituted reversible error (No. 85-526).

2. Whether petitioner was denied a fair trial by the prosecutor's disclosure of the identity of a confidential government informant shortly before the close of the government's case-in-chief where the informant was unavailable to and did not in fact testify at trial (No. 85-576).

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-526

NEWBY FRANKLIN LOVE AND
SUE ROBINSON YOUNGBLOOD, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 85-576

ROBERT EDWARD LEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-26a)[1] is reported at 767 F.2d 1052.

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[1]Unless otherwise noted, "Pet. App." refers to the appendix to the petition in No. 85-526.

JURISDICTION

The judgment of the court of appeals in both cases, which were consolidated in that court, was entered on July 3, 1985. A petition for rehearing was denied on July 29, 1985 (Pet. App. 28a). The petition for a writ of certiorari in No. 85-526 was filed on September 25, 1985. The petition for a writ of certiorari in No. 85-576 was filed on September 30, 1985, and therefore is three days out of time. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(a).

STATEMENT

Following a jury trial in the United States District Court for the District of South Carolina, petitioners were convicted of conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1962, and a variety of violations of the federal narcotics laws, 21 U.S.C. 842(a)(1), 846, 952(a), 960 and 963. Pet. App. 3a & nn.1-2. Petitioners Love and Youngblood were also convicted of violating the Travel Act, 18 U.S.C. 1952(a)(3), and transporting a stolen aircraft in interstate commerce, in violation of 18 U.S.C. 2313. Finally, petitioner Love was also convicted of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848. Petitioner Love was sentenced to a total of 70 years' imprisonment. Petitioner Youngblood was sentenced to a total of 35 years' imprisonment and three years' special parole. Petitioner Lee was sentenced to a total of 25 years' imprisonment and a special parole term of 25 years. Pet. App. 3a-4a & nn.1-2, 5. The court of appeals affirmed (Pet. App. 1a-26a).

1. The evidence at trial, the sufficiency of which is not in dispute, is summarized in the opinion of the court of appeals (Pet. App. 5a-11a). It showed that petitioners Love and Youngblood began to engage in interstate drug trafficking in 1980 and 1981, that they branched out into armed robberies in 1982, and that they continued to traffic in

cocaine that year. They also attempted to smuggle marijuana and cocaine from Colombia into this country. Petitioner Lee served as the pilot on a smuggling venture in December 1982. Pet. App. 5a-6a, 9a. In 1982, Youngblood and Love formed a drug trafficking partnership. Youngblood supplied cocaine that she transported from Florida to South Carolina, and Love then sold this cocaine to area drug dealers. Love also directed two of his associates to rob competing drug dealers and other persons whom Love believed would be unlikely to report the crimes to the police. Love furnished the weapons and vehicles that were used in the robberies and afterwards received the proceeds. Youngblood also received some stolen jewelry from one robbery. Lee was not involved in these crimes. Pet. App. 5a-6a.

During the latter half of 1982, Love and Youngblood attempted to smuggle marijuana and cocaine by airplane directly from Colombia, South America, to South Carolina, but they were unsuccessful on three different occasions. In November 1982, Love contacted Joseph Merolla, the owner of an airplane leasing service, and Frank Kelly, a Florida airport employee, for assistance in finding qualified pilots. Unbeknownst to Love, however, both Merolla and Kelly were informants for the Drug Enforcement Administration (DEA). When Love and Youngblood were unsuccessful in finding a qualified pilot, Kelly agreed to pilot the transport plane, and petitioner Lee was selected as Kelly's co-pilot. Lee and Kelly left for South America, but their trip was aborted when Kelly deliberately caused the plane to develop engine trouble. The scheme eventually failed when the aircraft, piloted by others, blew up after its takeoff in Colombia. Pet. App. 6a-9a.

Despite this setback, Love and Youngblood planned another smuggling venture. In early December 1982, Merolla informed the DEA that Love and others were planning to smuggle 700-800 pounds of cocaine from Colombia to

South Carolina around December 20. Merolla, who was responsible for equipping the transport plane with long range fuel tanks, installed an electronic beeper on the plane to enable the DEA to track its route. On December 19, Lee piloted the airplane to South America. Federal and state agents began surveillance of Lee's farm, the suspected primary landing site, as well as nearby airports in Sumter County, South Carolina. At roughly 9:00 p.m. that evening, the pilot of the transport plane requested clearance to land at the Sumter County Airport. Two men who knew Lee identified him as the pilot. After the plane landed, the agents sealed off the airport and searched the plane. They discovered 955 pounds of cocaine on board, two letters addressed to Lee from his attorney, a monogrammed shirt with Lee's initials, a thermos bottle containing Lee's fingerprints, and aeronautical charts in Lee's handwriting. The agents also stopped a pickup truck on an access road at the end of the runway; Lee was the driver. He appeared exhausted and reeked of chemicals. When arrested, Lee had Youngblood's telephone number on a slip of paper. Pet. App. 9a-10a.

Later that night, around 2:15 a.m., Youngblood and Love went to Lee's farm, where they were arrested. Both were later allowed to relieve themselves outdoors near the house. Agents later discovered several packages of cocaine and some torn-up papers in that area. The papers included the telephone numbers of Lee and another co-conspirator. Pet. App. 10a-11a.

2. The court of appeals affirmed petitioners' convictions (Pet. App. 1a-26a). It rejected their challenges to the district court's jury instructions on the ground that the instructions explaining reasonable doubt and credibility of witnesses did not constitute plain error when considered in light of the entire charge (*id.* at 14a-16a). The court also found that the instructions on intent did not impermissibly shift the

burden of proof to petitioners because the jury was not required to draw any inference of intent (*id.* at 13a-14a). The court also held that the instructions on the "mere presence doctrine" were not misleading or confusing (*id.* at 12a-13a). Finally, the court summarily rejected petitioner Lee's claim that the government's allegedly untimely disclosure of a confidential informant's identity denied him a fair trial (*id.* at 25a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court of petitioners' fact-bound claims is not warranted.

1. Petitioners Love and Youngblood argue (85-576 Pet. 7-13) that the district court's instructions on intent, proof beyond a reasonable doubt, the credibility of witnesses, and the "mere presence" doctrine were prejudicially erroneous. However, most of petitioners' claims were not properly preserved for review. Petitioner Love did not object to any of these instructions (C.A. App. 157), and petitioner Youngblood objected only to the "mere presence" charge (*id.* at 159-160). Aside from that exception, petitioners' challenges to the district court's jury charge can be sustained only if the instructions amounted to plain error. See, *e.g., United States* v. *Young*, No. 83-469 (Feb. 20, 1985), slip op. 12-14; *United States* v. *Frady*, 456 U.S. 152, 163 (1982). Under this standard, and given the overwhelming proof of petitioners' guilt, which they themselves appear to acknowledge (see 85-526 Pet. 3-6), the court of appeals correctly rejected petitioners' claims.

a. Petitioners contend (85-526 Pet. 7-8) that one of the district court's instructions on intent contained a mandatory presumption that shifted the burden of proof from the government to them, in violation of *Francis* v. *Franklin*,

No. 83-1590 (Apr. 29, 1985), and *Sandstrom* v. *Montana*, 442 U.S. 510 (1979).[2] That claim lacks merit.

To begin with, the instructions given here are materially different from those given in *Francis* and *Sandstrom*. In *Francis*, the instructions stated that "[t]he acts of a person of sound mind and discretion are presumed to be the product of the person's will" and that "[a] person [] of sound mind [] and discretion is presumed to intend the natural and probable consequences of his acts" (slip op. 8). Similary, in *Sandstrom* the instruction said that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts" (442 U.S. at 515). In each case, the instruction directed the jury to presume an essential element of the charged offense. By contrast, the instructions here told the jury only to "consider it reasonable" to infer that a person ordinarily intends the natural and probable consequences of his acts and did not tell the jury that it must draw that inference (C.A. App. 145); indeed, in the very next sentence the district court expressly told the jury that it "may draw the inference" (*ibid.*). As the court of appeals correctly noted (Pet. App. 14a), "the charge merely instructed the jury as to what a reasonable inference would be. The individual jurors were not required to draw any inference." Moreover, the instruction here also differed from those in *Francis* and *Sandstrom* in that the inference was to be drawn only from those acts that were "knowingly done or knowingly omitted" (C.A. App. 145). The instructions here therefore did not shift the burden of proving intent from the government to the defendant. See, *e.g.*, *United States* v. *Johnson*, 756 F.2d 453, 454-455 (6th Cir.

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[2]That charge was as follows (C.A. App. 145): "Now you must consider it reasonable to draw the inference and find that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted."

1985); *United States* v. *Caucci*, 635 F.2d 441, 447 (5th Cir.), cert. denied, 454 U.S. 831 (1981).

Furthermore, a single jury instruction may not be considered in isolation, but must be viewed in the context of the entire charge and the record of the trial, because the charge as a whole may clarify an ambiguous instruction or, by correctly stating the law, dissipate any prejudicial effect resulting from a single erroneous instruction. See, *e.g.*, *Francis*, slip op. 11; *Henderson* v. *Kibbe*, 431 U.S. 145, 152-156 (1977); *United States* v. *Park*, 421 U.S. 658, 674-675 (1975). Here, the district court repeatedly instructed the jury that the government had the burden of proving petitioners' guilt beyond a reasonable doubt (C.A. App. 95, 97-98, 101, 103, 109-110, 111-112, 126, 127, 128, 134-135, 136-137, 137, 139, 140, 142-143, 144, 146, 177, 178, 180, 184A, 190, 193, 194, 195-196, 198), told the jury that it must consider the charge as a whole (*id.* at 93), and instructed the jury that it was "permitted to draw from any facts or evidence any reasonable inferences which a person serving as a juror would be permitted to draw from established facts" (*id.* at 92; see *id.* at 96, 101). The jury therefore could not have been confused on this issue.[3]

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[3]In any event, petitioners Love and Youngblood were not prejudiced by this instruction because their intent was not an issue at trial. Petitioner Love testified at trial and denied that he had committed any of the charged offenses; he also challenged the credibility of the government's witnesses (see 85-526 Pet. 6). Petitioner Youngblood did not testify or offer any evidence in her defense, but she sought to establish an alibi through cross-examination of the government's witnesses (C.A. App. 157). In these circumstances, any error in the instructions on intent was harmless. See *Connecticut* v. *Johnson*, 460 U.S. 73, 87 (1983) (plurality opinion); *Martin* v. *Foltz*, 773 F.2d 711, 719 (6th Cir. 1985); *Tucker* v. *Kemp*, 762 F.2d 1480, 1496, 1501-1503 (11th Cir. 1985) (en banc); *Garland* v. *Maggio*, 717 F.2d 199, 203-204 (5th Cir. 1983); *McGuinn* v. *Crist*, 657 F.2d 1107, 1108-1109 (9th Cir. 1981), cert. denied, 455 U.S. 1107 (1982); cf. *United States* v. *Frady*, 456 U.S. 152, 169-174 (1982).

b. In defining a reasonable doubt, the district court told the jury that a reasonable doubt was "not a slight doubt" and was "not a fanciful doubt," but was "a fair doubt based upon reason and common sense, and arising from the state of the evidence[,] * * * a doubt for which you can assign a reason" (C.A. App. 97). The court also explained that "[p]roof beyond a reasonable doubt is established if the evidence is such as you would be willing to rely and act upon in the more important affairs of your own life. A defendant is not to be convicted on mere suspicion or conjecture" (*ibid.*). The trial court further told the jury that a reasonable doubt exists "when after a careful and impartial consideration of all of the evidence, you the jury does [*sic*] not feel convinced to a reasonable moral certainty that a defendant is guilty of the charges" (*id.* at 98). Petitioners Love and Youngblood contend (85-526 Pet. 9-10) that the latter two instructions diluted the government's burden of proof. The court of appeals, however, correctly found that the instructions, taken as a whole, did not constitute plain error.

The court's definition of a reasonable doubt as a "fair doubt based upon reason and common sense" was correct (see, *e.g., United States* v. *Del Toro Soto*, 676 F.2d 13, 17 (1st Cir. 1982)), and it is endorsed by 1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 11.14 (1977). The instruction on "willingness to act" is consistent with, although phrased differently from, the instruction approved in *Holland* v. *United States*, 348 U.S. 121, 140 (1954). Addition of the "moral certainty" instruction did not make the entire charge improper. Although the "moral certainty" language has been criticized on the ground that it may induce the jury to decide the case based on its feelings rather than on the evidence,[4] where, as here, the instruction

[4]The instruction can also be said to be unduly favorable to the defense, since the jury could construe the charge to require a higher standard of proof than proof beyond a reasonable doubt. Petitioners' failure to object may indicate satisfaction that the charge was favorable.

is part of a charge requiring the jury to base its verdict on the evidence (see, *e.g.*, C.A. App. 92, 93, 96-99), there is no realistic possibility that the jury will be confused. See *United States* v. *Drake*, 673 F.2d 15, 21 n.6 (1st Cir. 1982). Petitioners therefore were not prejudiced by this instruction. See *United States* v. *Del Toro Soto*, 676 F.2d at 17; *United States* v. *Drake*, 673 F.2d at 20-21; *United States* v. *Previte*, 648 F.2d 73, 83 (1st Cir. 1981); *United States* v. *Clayton*, 643 F.2d 1071, 1074-1075 (5th Cir. 1981); *United States* v. *Magnano*, 543 F.2d 431, 436-437 (2d Cir. 1976).[5]

c. The district court instructed the jury that it was the sole judge of the credibility of witnesses and that it should carefully scrutinize their testimony (C.A. App. 98). The court reiterated that principle with respect to the testimony of accomplices and informants (*id.* at 101-102). The court also instructed the jury to consider a witness's intelligence, motive, state of mind, and similar factors in evaluating the witness' credibility (*id.* at 99). The court further charged that "[i]f you find the presumption of truthfulness to be

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[5]None of the cases cited by petitioners (85-526 Pet. 9-10) holds that the use of this instruction amounts to plain error. In fact, only one case set aside a conviction because of an erroneous instruction on the term reasonable doubt, *Dunn* v. *Perrin*, 570 F.2d 21 (1st Cir.), cert. denied, 437 U.S. 910 (1978), and the instructions in that case erroneously defined that term three times, in a manner that shifted the burden of proof to the accused (570 F.2d at 24-25).

Petitioners also criticize (85-526 Pet. 10) that portion of the charge telling the jury to "say so" whether a defendant was guilty or not (C.A. App. 148). However, the district court repeatedly instructed the jury on the government's burden of proof. Accordingly, there is no realistic possibility that this instruction led the jury to believe that the defendant bore the burden of proof, and no plain error arose from the giving of this instruction. See *United States* v. *Thomann*, 609 F.2d 560, 565 (1st Cir. 1979); *United States* v. *Urbanis*, 490 F.2d 384, 386-387 (9th Cir.), cert. denied, 416 U.S. 944 (1974); *United States* v. *Cummings*, 468 F.2d 274, 280-281 (9th Cir. 1972). None of the cases cited by petitioners (85-526 Pet. 10) is to the contrary.

outweighed as to any witness, you will give the testimony of that witness such credibility, if any, as you may think it deserves" (*ibid.*). Finally, the court charged that the jury had the exclusive power to give a witness such credibility as it deemed proper (*id.* at 100).

Although petitioners Love and Youngblood are correct (85-526 Pet. 11) that a "presumption of truth" instruction is disfavored, the use of that instruction does not automatically constitute reversible error. *Cupp* v. *Naughten*, 414 U.S. 141 (1973). For instance, when a defendant testifies or presents defense witnesses, as petitioner Love did in this case, he receives the benefit of the presumption in the same manner as the government's witnesses. Thus, as to petitioner Love, the instruction did not unfairly benefit the prosecution. See, *e.g.*, *United States* v. *Gutierrez-Espinosa*, 516 F.2d 249, 250 (9th Cir. 1975); *United States* v. *Boone*, 401 F.2d 659, 661-662 (3d Cir. 1968), cert. denied, 394 U.S. 933 (1969). Moreover, any potentially prejudicial effect of the instruction was substantially diluted by the court's other instructions on the meaning of a reasonable doubt, the government's burden of proof, and the jury's power to decide the credibility of witnesses and to reject testimony that it found unreliable. Those instructions correctly informed the jury of its duty to determine whether a witness was credible and thereby eliminated any prejudicial effect of the challenged instruction. In these circumstances, the use of the "presumption of truth" instruction did not constitute plain error. See *United States* v. *Ramos-Alganin*, 584 F.2d 562, 569 (1st Cir. 1978); *United States* v. *LaRiche*, 549 F.2d 1088, 1093-1094 (6th Cir.), cert. denied, 430 U.S. 987 (1977); *United States* v. *Chrisco*, 493 F.2d 232, 238 (8th Cir.), cert. denied, 419 U.S. 847 (1974); *United States* v. *Safley*, 408

F.2d 603, 605-606 (4th Cir.), cert. denied, 395 U.S. 983 (1969).[6]

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[6]Petitioners Love and Youngblood also contend (85-526 Pet. 11-12) that they were prejudiced by the district court's "mere presence" instruction. The district court gave the following instruction on the "mere presence" doctrine (Pet. App. 12a n.7; C.A. App. 146): "I would instruct you that mere presence at or near the scene of a crime, or where a crime was supposed to be committed, is insufficient to establish that a defendant joined a conspiracy or aided and abetted in the commission of the crime. If you should find that Ruiz and Restrepo were not willfully part of the conspiracy, or that they were—and that they were—and that they were merely present near where the crime was committed then it would be your duty to find them not guilty." Ruiz and Restrepo were co-defendants in this case and were acquitted on all of the charges against them. The district court gave the charge in this form because Ruiz and Restrepo had requested it. Petitioner Love and Youngblood contend that they were prejudiced by this instruction because only their co-defendants were specifically identified. That contention is not well-founded, and there is no conflict among the circuits on petitioners' fact-bound claim.

To begin with, petitioner Love erroneously asserts (85-526 Pet. 12) that he objected to the district court's charge on the mere presence doctrine. Petitioner Love's counsel initially stated that he had no objections to the charge (C.A. App. 157) and his later remarks, read in context, do not expressly state an objection to the charge (*id.* at 169). Moreover, the proof of Ruiz's and Restrepo's involvement in the smuggling operation was quite limited; they were arrested while driving a recreational vehicle outside of Lee's farm, and there was no direct proof that they were involved in the smuggling operation (10 Tr. 220-228, 252-256, 263, 273-286, 289-293; 11 Tr. 218-231). The proof of Love's and Youngblood's involvement was far more substantial. Beyond that, because both petitioners presented alibi defenses (see page 7 note 3, *supra*), the "mere presence" instruction was not relevant to their defenses. In any event, the jury charge, read as a whole, included them as well. The district court also instructed the jury that (C.A. App. 132): "Mere association between a principal and the accused of aiding and abetting is not sufficient to establish guilt, nor is mere presence at or near the scene, or even knowledge that the crime was being committed, sufficient, standing by itself, to establish aiding and abetting." This charge also referred to the "mere presence" doctrine, and it did not identify any particular defendant or suggest that it was inapplicable to petitioners.

2. Petitioner Lee contends (85-576 Pet. 13-32) that he was denied a fair trial because the prosecutor did not reveal the identity of a confidential government informant until shortly before the close of the government's case-in-chief. The court of appeals summarily rejected this insubstantial claim (Pet. App. 25a), and its ruling does not warrant further review.

As explained above, in mid-December 1982, Joseph Merolla, the owner of an airplane leasing company used by petitioner for a smuggling operation and also a confidential government informant, tipped off the DEA that petitioner Love was preparing to smuggle cocaine from Colombia to South Carolina by airplane on December 19 (Pet. App. 8a-9a). Merolla also tentatively identified Garrett Clark as the scheduled pilot of the transport plane (*id.* at 23a). On December 17, the Miami DEA office sent the DEA office in Columbia, South Carolina, a telex describing Merolla's tip, but not identifying him as its source (85-576 Pet. App. 85-86). The government furnished petitioner with a copy of the telex either before or during the trial (see Gov't C.A. Br. 52-53).

Before trial, petitioner Lee moved for disclosure of the identity of any government informants. The government moved to withhold its informants' identities until they had testified, "for security reasons" (85-576 Pet. App. 97), and the prosecutor told the court that all participating informants would testify (*id.* at 96-98). The court granted the government's motion. However, during the government's case-in-chief the prosecutor informed the district court that he had been unable to locate Merolla despite having issued two grand jury subpoenas and two trial subpoenas for him and despite having asked the Marshal's office, the DEA, and the FBI for their assistance in discovering Merolla's whereabouts. Shortly thereafter, the court ordered the government to disclose Merolla's identity to the defense,

and the government complied (9 Tr. 23-25, 83-85; 85-576 Pet. App. 99-101). Merolla did not testify at trial.[7]

Petitioner's claim appears to be that the government denied him a fair trial by failing to divulge Merolla's identity prior to trial, which deprived him of the opportunity to present an exculpatory defense witness. However, petitioner has failed to demonstrate that Merolla's expected testimony would have led to a different outcome at trial. See *United States* v. *Bagley*, No. 84-48 (July 2, 1985), slip op. 10. Merolla's tentative identification of Clark as the pilot of the transport plane several days before the actual flight took place was not exculpatory (see, *e.g.*, *Hughes* v. *Hopper*, 629 F.2d 1036, 1040 (5th Cir. 1980), cert. denied, 450 U.S. 933 (1981)), and the court of appeals found that there was "overwhelming evidence in the record implicating [petitioner] Lee and contradicting the 'tentative' identification of Clark as the pilot in the telex" (Pet. App. 23a (footnote omitted); see *id.* at 23a-24a n.14 (describing the evidence)). Accordingly, even assuming that petitioner Lee could have subpoenaed Merolla had he been aware of Merolla's identity before trial, there is no reasonable probability that Merolla's testimony would have led to petitioner's acquittal. See *Bagley*, slip op. 10-14.

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[7]At trial, petitioner Lee unsuccessfully sought to introduce the telex into evidence and to cross-examine a witness about its contents. Assuming that the district court had erred by denying petitioner the right to introduce the telex, the court of appeals held that any error was harmless given the overwhelming proof that Lee had piloted the aircraft (Pet. App. 23a & n.14). Lee has not sought review of that ruling in this Court.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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